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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 389

MARIA GARCIA-GONZALES,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner, Maria Garcia-Gonzales, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 28, 1965.

OPINIONS BELOW

The decision of the Board of Immigration Appeals (R. 3) is not reported but a copy thereof is appended

to this petition as Appendix A, pp. 1-3. The opinion of the Court of Appeals for the Ninth Circuit (R. 48) sustaining the order of deportation is reported at 344 F2d 804.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were made and entered on April 28, 1965 (R. 48-58), and copies thereof are appended to this petition as Appendix B, pp. 4-14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Has there been a conviction within the contemplation of Section 241 of the Immigration and Nationality Act where a state criminal record has been expunged and the criminal proceeding dismissed under State Statute?

Can an order of deportation charging that an alien has been convicted of a violation of a state statute, relating to possession of a narcotic drug, be sustained if no present record of conviction exists?

STATUTES INVOLVED

Immigration and Nationality Act of 1952

"Section 241. Deportable aliens—General Classes. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——

* * * * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

(66 Stat. 204, 8 USCA 1251(a)(11)).

The Penal Code of California, Part 2, Title 8, Chapter 1.

"Sec. 1203.4 (Right of Discharged Probationer to withdrawal of plea of guilty or vacation of verdict of conviction: Release from disabilities: Making of application: Pleading of conviction in

prosecution for subsequent offense: Effect of dismissal of accusation or information pursuant to this Section.)

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021. (Added by Stats. 1935, ch. 604, Sec. 5, p. 1709; amended Stats. 1941, ch. 1112, Sec. 1, p. 2815;

amended by Stats. 1951, ch. 183, Sec. 1, p. 434; amended Stats. 1961, ch. 1735, Sec. 1)."

Title 28, United States Code, Judiciary and Judicial Procedure—

"Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit

"The Acts of the legislature of any State, Territory, or possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereof.

"The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(June 25, 1948, c. 646, 62 Stat. 947.)

STATEMENT OF THE CASE

The facts are not disputed. Petitioner is a married female alien, a native and citizen of Mexico. She was lawfully admitted to the United States for permanent

residence on February 4, 1924, at which time she was less than 10 years of age. Petitioner has resided continuously in the United States since that date, except for brief temporary visits to Mexico, the last occurring in December, 1960.

On November 14, 1961, petitioner entered a plea of guilty to two counts charging violation of Section 11500 of the Health and Safety Code of the State of California. A copy of the Judgment of the Superior Court (R. 36-37) is set forth fully in Appendix C, pp. 15-17. On November 5, 1962, the same Superior Court (R. 9) entered an order permitting petitioner to withdraw her plea of "guilty" and enter a plea of "not guilty" to the said charges. The Court then further ordered that the action be dismissed and the record of conviction expunged (Appendix D, pp. 18-19).

Respondent ordered petitioner deported as an alien who has been convicted of a violation of law described in Section 241(a)(11) of the Immigration and Nationality Act of 1952 (66 Stat. 204, 8 USCA 1251(a)(11)). The Board of Immigration Appeals, in its decision dated December 4, 1962 (Appendix A, pp. 1-3), held that the action of the Superior Court of the State of California in and for the County of San Benito, permitting petitioner to withdraw her plea of guilty, enter a plea of not guilty, and ordering that the action be dismissed and the record of conviction expunged, did not affect the order of deportation—citing the decision of the Attorney General dated October 12, 1959 in the *Matter of A_____ F_____*, Immi-

gration File A2904545. The decision of the Attorney General in *Matter of A_____ F_____* is set forth fully in Appendix E, pp. 20-52.

Jurisdiction of the Court of Appeals to entertain the Petition for Review is conferred by Public Law 87-310, effective October 26, 1961, 75 Stat. 651, 8 USC 1105(a)(3).

REASONS FOR GRANTING THE WRIT

This writ of certiorari is sought because the issues presented herein raise extremely important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other Circuits.

I

The decision below is in conflict with the decision of this Court in *Pino v. Landon,* 349 U.S. 901 (1955), or, if it is not so in conflict then this issue of far-reaching importance compels a definition of the term "conviction", which was not done by the Court in its per curiam opinion. In either event, this Court should grant the writ.

This Court in *Fong Haw Tan v. Phelan,* 333 U.S. 6, at page 10, stated:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile,

> Delgadillo v. Carmichael, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

Reiterating this principle, Chief Justice Warren has written:

> "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' * * * and should be strictly construed." *Barber v. Gonzales*, 347 U.S. 637, 642 (1954).

The decision of the Court below affirms the decision of the Attorney General in the *Matter of A.....F.....*, 8 I&N Decision 429 (Appendix E, pp. 20-52, that an expungement of a record of conviction under Section 1203.4 of the Penal Code of California has no effect in reference to aliens convicted of offenses mentioned in Section 241(a)(11). The decision of the Attorney General in *Matter of A.....F.....*, supra, gives cognizance to a record of conviction so expunged under Section 241(a)(4), (66 Stat. 204, 8 USC 1251(a)(4)), but refuses to recognize such judicial proceedings under Section 241(a)(11). If there is no finality of conviction to support an order of deportation under Section 241(a)(4), there likewise

can be no finality of conviction to support an order under Section 241(a)(11).

This inconsistent statutory construction of the term "conviction" as applied to subsections of the same section of law is an issue which should be resolved by this Court.

II

The Court of Appeals for the Third Circuit, in the case of *Sawkow v. Immigration and Naturalization Service,* 314 F2d 34, 37 (1963), when considering a case where a judgment of conviction had been vacated, stated:

> "It urges, however, that if a judgment of conviction is vacated for the purpose of avoiding deportation, a subsequent recommendation is ineffectual. This argument misses the mark, for no contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of *non vult* together with the judgment of conviction, and subsequently dismissing the indictment. Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment."

The same Court, in *Holzapfel v. Wyrsch,* 259 F2d 890 (1958), at page 891, stated:

> "In deportation cases where a state crime is involved we have to look to the law and procedure of the state to interpret what happened in the state court. * * *"

The decision of the Board of Immigration Appeals charges that petitioner is deportable from the United

States as an alien convicted of an offense in violation of the laws of the State of California. The record establishes that the judicial proceedings upon which the deportation grounds are predicated were subsequently dismissed and the record of conviction expunged under Section 1203.4 of the Penal Code of California. How can it now be contended that there exists a record of conviction?

The Court below, contrary to the decisions of the Third Circuit in *Sawkow v. Immigration and Naturalization Service,* supra, and *Holzapfel v. Wyrsch,* supra, refused to recognize the state proceedings because such a view would make the deportability of an alien rest upon the vagaries and peculiarities of state law. As was stated by Judge Ely in his dissenting opinion in *Kelly v. Immigration and Naturalization Service* (an analogous case decided by a different panel of the Ninth Circuit):

> "Now, our court has said that while it will respect California law, insofar as California law provided for the crime and the 'conviction', it may not accord to California the same respect in the application of its statute or of its decisions in the interpretation of the effect of a subsequent procedure taken under a California statute of the same dignity as that which created the crime * * *." (_____ F.2d _____, 9 Cir., decided June 29, 1965, Appendix F, pp. 53-64, at p. 57.)

This conflict, regarding a question of such vital importance in the interpretation of the immigration and nationality laws of the United States, is sufficient to justify intervention by this Court.

III

The questions presented by this case are of great and recurring significance in the administration of our immigration and nationality laws. The decision of the Court below holds, contrary to Section 1738, Title 28, United States Code, that the Immigration and Naturalization Service is not required to give full faith and credit to the judicial proceedings of a state court. In essence, it permits the administrative agency to ignore, or give no credence to, a valid, authenticated judicial record. We assert that administrative agencies are required to give the same comity to the full faith and credit provisions as do State and Federal Courts. Refusal of the court to recognize this statutory principle leaves unsettled an important question of federal law which should be decided by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
July 20, 1965.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

(Appendices A through F Follow)

Appendix A

United States Department of Justice
Board of Immigration Appeals

Dec 4—1962

File: A-2589930—San Francisco
In re: Maria Garcia-Gonzalez
In Deportation Proceedings
Motion

On behalf of respondent: Joseph S. Hertogs, Esquire
580 Washington Street
San Francisco 11, Calif.

Charges:

Order: Sec. 241(a)(11), I&N Act (8 USC 1251 (a)(11))—Narcotics possession, conviction: Section 11500, California Health and Safety Code (heroin)

Lodged: None

Application: Termination or reopening and reconsideration

This case comes forward pursuant to respondent's motion submitted through counsel at the San Francisco, California office of the Service on November 18, 1962, requesting that the proceedings in the instant case be terminated or in the alternative reopened for reconsideration of our decision of February 26, 1962. The respondent, a 48-year-old female, a native and citizen of Mexico, has resided continuously in the United States since her admission thereto

for permanent residence on March 4, 1924. She was last admitted to the United States at El Paso, Texas in February 1960 after an absence of one and one-half months in Mexico, D. F., Mexico. When this case was last before us on February 26, 1962, we dismissed the appeal from an order entered by the special inquiry officer on December 19, 1961, directing that the respondent be deported from the United States pursuant to law on the charge designated above.

The respondent was convicted of violation of Section 11500 under the Health and Safety Code of California on November 14, 1961. Counsel asserted that on November 5, 1962, the respondent was permitted to withdraw her plea of guilty and enter a plea of not guilty to the charge for which she was convicted in November 1961. According to counsel there no longer remains as an official record a conviction which would sustain the respondent's deportation under Section 241(a)(11) of the Immigration and Nationality Act. There is no merit to counsel's argument that the respondent is no longer amenable to deportation because she was permitted by the Superior Court of the State of California, in and for the County of San Benito on November 5, 1962, to withdraw a prior plea of guilty and enter a plea of not guilty to the charge of violating Section 11500 of the California Health and Safety Code. The Board in its decision of February 26, 1962, referred to *Matter of A-F-*, A-2904545, decided by the Attorney General on October 12, 1959. In the *Matter of A-F-*, supra, it was held that a finding of deportability under Sec-

tion 241(a)(11) of the Immigration and Nationality Act based upon conviction of a state narcotics offense is not affected by a technical "expungement" or erasure of conviction record, as authorized by some state statutes, upon fulfillment of conditions of probation, such as Section 1203.4 of the California Penal Code or Section 1772 of the Welfare and Institutions Code. Accordingly, the foregoing action of the Superior Court of the State of California for the County of San Benito, in permitting the respondent to withdraw a plea of guilty and enter a plea of not guilty under Section 1203.4 of the California Penal Code in nowise affects the order of deportation. Hence, the following order will be entered.

Order: It is ordered that the appeal be dismissed and that the motion be denied.

Thos. S. Finucane
Chairman

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA GARCIA-GONZALES,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 18,375

[April 28, 1965]

Petition to Review an Order of the Immigration and Naturalization Service

Before: MADDEN, Judge, Court of Claims, and JERTBERG and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

Petitioner was born in Mexico in 1914. When she was not quite ten years old, she entered the United States as an immigrant and she has resided in this country ever since, her period of residence now being over forty years. She has never been naturalized, and remains a Mexican national. So far as appears, she has been a self-respecting, self-supporting member of the communities in which she has lived. However, in 1961 she pled guilty to two counts of a six-count information that had been filed against her in the Superior Court of the State of California, County of San Benito, charging violations of sections 11500 and 11501 of the California Health and Safety Code. The two counts to which she pled guilty charged her with the unlawful possession of heroin. Her plea of guilty was accepted and she was given three years probation, two of the terms of which were that she was to serve six months in the county jail and pay a fine of $1,000. This judgment was entered against her on November 14, 1961.

Under date of December 4, 1961 she was served with an order to show cause and notice of hearing in deportation proceedings. This notice alleged her conviction and that by reason of it she was subject to deportation pursuant to section 241(a)(11) of the Immigration and Nationality Act (the Act) (8 U.S.C. §1251(a)(11)).[1] A hearing was held on December 19, 1961 at which proof of the conviction was received in evidence and she admitted the conviction. On the same day the Special Inquiry Officer decided that she was subject to deportation and ordered that she be deported to Mexico. On February 9, 1962, she appealed to the Board of Immigration Appeals. Her appeal was dismissed on February 25, 1962. The Board found that the order was fully supported by the evidence and that petitioner was not eligible for any form of discretionary relief.

On November 5, 1962 petitioner again appeared before the Superior Court of California, San Benito County. Her probation was terminated and she withdrew her plea of guilty and pled not guilty to the charge. This was done pursuant to section 1203.4 of the California Penal Code.[2] The record does not affirmatively

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[1]"(a) Any alien in the United States . . . shall . . . be deported who— . . . (11) . . . at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of . . . any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of . . . heroin . . . ."

[2]"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of his right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in

show that upon withdrawal of the plea of guilty and substitution of the plea of not guilty the court actually dismissed the information against her. However, the language of the statute is mandatory and we presume therefore that the court did so. On November 8, 1962 petitioner moved to reopen or reconsider the deportation order of December 19, 1961 and the decision of the Board of Immigration Appeals of February 26, 1962 on the ground that her conviction had been wiped out or expunged under the provisions of the California Penal Code. On December 4, 1962 the Board of Immigration Appeals denied the motion and dismissed the appeal. This proceeding was filed on January 19, 1963.

At the time that the matter was argued before us, it appeared that under our decisions an order refusing to reopen or reconsider a final order of deportation was not subject to review in a proceeding such as this, which was filed pursuant to section 106 of the Act (8 U.S.C. §1105a, as amended in 1961). Our decisions were based on the ground that this section authorized review by us of final orders of deportation only, and that a refusal to reopen or reconsider is not such an order. See *Giova v. Rosenberg*, 9 Cir., 1962, 308 F.2d 347. The Supreme Court had granted certiorari in the *Giova* case and we therefore deferred submission of this case pending its decision. On October 26, 1964 the Court decided the *Giova* case (..... U.S. .....), reversing our decision and remanding the case to us with directions to entertain the petition for review. Under that decision we have jurisdiction in the present case. We therefore proceed to the merits.

The sole question presented is whether the setting aside of the plea of guilty, entry of a plea of not guilty, and dismissal of the information, pursuant to California law, has so far "wiped out" or "expunged" the conviction upon which the deportation

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any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."

order rests that that order must be reconsidered. We answer this question in the negative.

While the precise question has not heretofore been decided by us, our prior decisions point to, and indeed, require the result that we now reach. In *Arrellano-Flores v. Hoy*, 9 Cir., 1958, 262 F.2d 667 the alien was convicted in a California court of unlawfully selling marihuana. The proceedings in the state court were suspended and probation was granted upon condition that the alien serve one year in the county jail. We held that this was nevertheless a conviction within the meaning of section 241(a)(11). We there pointed out that California has held that such a disposition is a conviction. (*In re Morehead*, 107 Cal.App. 2d 346, 237 P.2d 335; *People v. Christman*, 41 Cal.App.2d 158, 106 P.2d 32.) We also indicated a belief that in enacting the statute, "Congress intended to do its own defining [of 'conviction'] rather than leave the matter to variable state statutes."

In *Adams v. United States*, 9 Cir., 1962, 299 F.2d 327, a citizen had been found guilty of unlawful possession of marihuana and committed to the California Youth Authority for the term prescribed by law. We held that this was a conviction, within the meaning of a statute requiring a person convicted of a violation of any narcotic law to register before departing from or entering into the United States. (18 U.S.C. §1407). In that case, citing *Arrellano-Flores*, supra, we said: "We do not think that 18 U.S.C. §1407 incorporates all of the niceties and nuances of state laws on the subject of conviction." We also held that evidence offered to show that the alien's conviction had been "wiped out" pursuant to the provisions of section 1772 of the California Welfare and Institutions Code was properly excluded. That section, which is quoted in our opinion in *Adams*, is quite similar to section 1203.4 of the California Penal Code. In so holding, we cited and quoted from our decision in *Wood v. Hoy*, 9 Cir., 1959, 266 F.2d 825.

Wood v. Hoy was another case in which there was a suspended sentence. We held that the alien had nevertheless been convicted within the meaning of section 241(a)(4) of the Act, which deals with convictions of offenses involving moral turpitude other than narcotic offenses. The alien there relied upon section 1203.4 of the California Penal Code, and we said "because California courts

retain some control over the final disposition of a probationer's criminal record, it does not follow that such control precludes a finding that the probationer was 'convicted' by that court." We also pointed out that under decisions of the California courts relating to section 1203.4 of the California Penal Code, that section does not in fact wipe out a conviction for all purposes.[3]

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[3]Respondent in its brief points to the following particulars in which the conviction is not "wiped out", in addition to those specified in the section itself: "The California statute itself conditions the setting aside of the verdict and the release of disabilities upon the fact of conviction —'if he has been convicted,' *supra*—and it also provides within its own test that the later changing of the record shall be ineffective in a subsequent prosecution for another offense. *People v. Hainline*, 219 Cal. 532, 534; *People v. Barwick*, 7 Cal.2d 696, 699, 62 Pac.2d 590; *People v. Christman*, 41 Cal.App.2d 158, 160, 106 Pac.2d 32; *People v. Acosta*, 115 Cal.App. 103, 107, 1 Pac.2d 43; *People v. Majado*, 22 Cal.App.2d 323, 326, 70 Pac.2d 1015; *People v. Leach*, 22 Cal.App.2d 525, 528, 71 Pac.2d 594. Under the California Vehicle Code, Section 309, the changed record will not prevent revocation of a vehicle license for two or more convictions. *Ellis v. Department of Motor Vehicles*, 51 Cal.App.2d 753, 757-758, 125 Pac.2d 521; *cf.* [*contra*] *Sherry v. Ingels*, 34 Cal.App.2d 632, 634-635, 94 Pac.2d 77. The conviction also remains effective, despite the so-called expunging: for impeachment of the offender as a witness, *People v. O'Brand*, 92 Cal.App.2d 752, 755-756, 207 Pac.2d 1083; *People v. James*, 40 Cal.App.2d 740, 746, 747, 105 Pac.2d 947; *cf.* [*contra*] *People v. Mackey*, 58 Cal.App. 123, 131, 208 Pac. 135; for disbarment as an attorney, *Roth v. State Bar*, 40 Cal.2d 307, 309, 312, 253 Pac.2d 969; *In re Phillips*, 17 Cal.2d 55, 57-61, 63-64, 109 Pac.2d 344, 132 A.L.R. 644; *cf. In re Hickman*, 18 Cal.2d 71, 74, 113 Pac.2d 1; for suspending a physician's license, *Meyer v. Board of Medical Examiners*, 34 Cal.2d 62, 65-67, 206 Pac.2d 1085; for proof in an action on injuries arising out of the offense, *Vaughn v. Jonas*, 31 Cal.2d 587, 594-596, 191 Pac.2d 432; and for continuing the duty of an ex-convict to register under local ordinances or under sex offenders' registration, 28 Ops. Atty. Gen. Cal. 178, 184-185." There are also many statutory exceptions to the stated effect of section 1203.4: Cal. Bus. and Prof. Code §§1679 (discipline of dentists); 2383, 2384 (discipline of physicians); 2963 (discipline of licensed psychologists); 6102 (discipline of attorneys); 10,177 (discipline of licensed real estate dealers); 10,302 (discipline of licensed business opportunity brokers); 10562 (discipline of mineral, oil and gas licensees); Cal. Vehicle Code §13555 (revocation of motor vehicle drivers' licenses); Cal. Education Code §§12910, 12911 (discipline of teachers).

In *Hernandez-Valensuela v. Rosenberg*, 9 Cir., 1962, 304 F.2d 639, it was claimed that a comparable provision of the Federal Youth Correction Act (18 U.S.C. §5021(a)), under which the conviction of a youth offender is automatically set aside upon his unconditional discharge before the expiration of the maximum sentence imposed, did not have the effect of rendering his conviction not final. However, it did not appear that the alien involved in that case had in fact been discharged. In discussing the problem, we said: "It is true that the sentence imposed carries with it the possibility of congressional grace upon the unconditional discharge, but such possibility of future grace in no respect affects the present fact of guilt" (p. 640). We also pointed out that section 241(b) of the Immigration and Nationality Act (8 U.S.C. §1251(b)) evidences a congressional intent that such a statutory provision for forgiveness is not to affect the offender's deportability.

We made similar rulings in other cases. *Zabanazad v. Rosenberg*, 9 Cir., 1962, 306 F.2d 861, like this case, involved subsection (a), subdivision (11) of section 241. The alien was a state offender who had been committed to the California Youth Authority, and we cited and followed *Adams, supra.* In *Gutierrez v. I.N.S.*, 9 Cir., 1963, 323 F.2d 593, the alien was convicted in a California court of unlawful possession of marihuana. The proceeding was then suspended and he was placed on probation. We held, citing *Arrellano-Flores, supra,* that the defendant had been convicted within the meaning of the statute. The opinion relies in part upon *Adams, Hernandez-Valensuela* and *Zabanazad, supra.*

We recognize that none of these cases decides the precise question here presented, because in none of them had the alien completed his probation and received the benefit of the provisions of section 1203.4 of the California Penal Code or of a comparable statute. Perhaps the *Adams* case is most closely in point. But we think that the principles that they apply require the conclusion that the California statute does not "wipe out" the conviction or "expunge" it for the purposes of section 241(a)(11) of the Immigration and Nationality Act.

Militating against petitioner's contentions are the following considerations:

1. Section 1203.4 rewards a convict who has fulfilled the terms of his probation, first, by changing the record of his conviction to show a plea of not guilty and a dismissal, and second, by releasing him "from all penalties and disabilities resulting from the offense or crime of which he has been convicted." We would take these to be penalties and disabilities imposed by California law. We doubt that the California legislature intended to, or could, release petitioner from penalties or disabilities imposed by federal law, although Congress could, if it chose, give California's action that effect. Moreover, by its own terms, as well as by the terms of other statutes, section 1203.4 does not, in fact, release *all* penalties and disabilities. (Footnote 3, *supra*).

2. It is sheer fiction to say that the conviction is "wiped out" or "expunged." What the statute does is reward the convict for good behavior during probation by releasing certain penalties and disabilities.

3. As we said of section 1772 of the California Welfare and Institutions Code and 18 U.S.C. §1407 in *Adams v. United States*, *supra*, pp. 330-331; "We have already indicated that the applicability of §1407 does not depend upon all of the peculiarities of the laws of the various states. We think that this is particularly true with reference to such a statute as California's. We are told that it is almost unique in this country. (Comment, 2 Stan. L.R. 221, 222. See, however, Nevada Rev. Stat. §176-340, and 18 U.S.C. §5021). It would defeat the purposes of §1407, which we discussed at some length in *Reyes v. United States*, 9 Cir., 1958, 258 F.2d 774, if provisions of local law, dealing with rehabilitation of convicted persons, could remove them from the ambit of section 1407. Many of the states have such provisions, but most of them do not reward the convicted by a technical wiping out of the conviction. Thus, under appellant's theory, most persons who are as fully rehabilitated as he, would have to register, whereas he, because of the peculiarity of California law, would not. We do not think Congress intended such a result." We think that the same reasoning is applicable to section 241(a)(11) of the Act and California Penal Code §1203.4. The Attorney General has taken the same position in his decision in Matter of A——— F———, 8 I. & N. Dec. 429, 445-46:

"The history of §241(a)(11) convinces me that Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction. Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strengthened the deportation laws dealing with aliens involved in such traffic. Thus, as indicated above, in 1940 the deportation statute was amended to eliminate the requirement that in addition to a conviction there must be a sentence. At the same time the statute was extended to convictions for violation of State as well as Federal statutes. And, since the 1956 amendment an alien may no longer escape deportability by proffering a pardon. In the face of this clear national policy, I do not believe that the term 'convicted' may be regarded as flexible enough to permit an alien to take advantage of a technical 'expungent' [sic] which is the product of a state procedure wherein the merits of the conviction and its validity have no place. I believe that Congress intended the inquiry to stop at the point at which it is ascertained that there has been a conviction in the normal sense in which the term is used in Federal law. See *Berman v. United States*, 302 U.S. 211. (A defendant is convicted even though the trial court, after imposing sentence, has placed the defendant on probation). Of course, if the conviction is still subject to reversal by the usual processes of appellate scrutiny, the statute is not satisfied. But beyond this I do not think the inquiry can extend, consonant with the Congressional purpose and policy. I, therefore, regard it as immaterial for the purposes of §241(a)(11) that the record of conviction has been cancelled by a state process such as is provided by §1203.4 of the California Penal Code and by §1772 of its Welfare and Institutions Code.

Moreover, to follow the Board's view would make the deportability of the alien depend upon the vagaries of state law. It has been said that only in California and a few other States is provision made for the cancellation of a record of conviction or for the withdrawal of a plea of guilty, upon the termination of probation. *Probation and Related Measures*

(U.N. Publication No. 1951, IV, 2) 106. And §1203.4 of the California Penal Code (and presumably §1772 of the California Welfare and Institutions Code) has been characterized as 'without parallel in the legislation of any other state' in providing for a release of the probationer from all penalties and disabilities resulting from conviction. 2 Stan. Law Rev. 221, 222 (1949). It is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions, which, like California, provide for the expungement of a record of conviction upon the termination of probation."

We applied similar reasoning to 18 U.S.C. §5021(a) in *Hernandez-Valensuela v. Rosenberg, supra.*

We are aware that the Immigration and Naturalization Service has long held that a convicted person who has actually received the benefit of the provisions of section 1203.4 of the California Penal Code cannot be deported under section 241(a), subdivision (4) of the Act. (Matter of F....., B.I.A. 1942, 1 I. & N. Dec. 343; Matter of O..... T....., B.I.A. 1951, 4 I. & N. Dec. 265; Matter of E..... V....., B.I.A. 1953, 5 I. & N. Dec. 194; *cf.* Matter of H....., B.I.A. 1955, 6 I. & N. Dec. 619. The Board of Immigration Appeals and the Attorney General have made similar rulings as to the effect of a somewhat comparable Texas statute. (Matter of G....., B.I.A. 1941, 1 I. & N. Dec. 96; Matter of L..... R....., Attorney General 1957, 7 I. & N. Dec. 322). The Board made a similar ruling in connection with a narcotics conviction in Matter of D....., 1958, 7 I. & N. Dec. 670. This, however, was overruled by the Attorney General in Matter of A..... F....., *supra.* Moreover, being consistent with section 1203.4's own terms, the service has held that a second conviction makes available for deportation purposes a prior conviction that had been "expunged" under that section. (Matter of S..... R....., B.I.A. 1957, 7 I. & N. Dec. 495). These decisions relating to subdivision (4) have recently been reaffirmed by the Attorney General in Matter of G....., 1961, 9 I. & N. Dec. 165, in which he distinguishes Matter of A..... F....., *supra.*

We are aware, too, that matters of doubt should be resolved in favor of the alien in deportation proceedings, because of the severity of the remedy invoked. (*Fong Haw Tan v. Phelan*, 1948, 333 U.S. 6). Our duty, taking into account applicable rules of construction, is to ascertain the intention of Congress. We agree with the Attorney General as to that intention, in reference to aliens convicted of offenses mentioned in subdivision (11). We express no view as to subsection (4).

Affirmed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA GARCIA-GONZALES, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 18,375

JUDGMENT

Upon Petition to Review an Order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered: April 28, 1965.

Appendix C

Hollister, California
Nov. 14, 1961

Regular November session of the Superior Court. Present: Hon. Edward L. Brady, Judge; Ralph G. Towle, Clerk; and John A. Lucchetti, Sheriff, when the proceedings were had, to wit:

People of the State of California vs. Mary Gonzalez Garcia	No. 1075

Defendant, her attorney Raymond Shelloe, District Attorney John H. O'Brien and Probation Officer Richard Galli were present in open Court.

An Information having been previously filed herein accusing Defendant of the crimes of felonies: to-wit: violation of Section 11500 of the Health and Safety Code of the State of California (possession of heroin, two counts), and defendant having plead "Guilty" to these two counts in the Information, and it now being time for report of the Probation Officer and pronouncement of sentence, the following proceedings were had, to-wit:

The report of the Probation Officer had been read and considered by the Court, Defendant and her attorney.

Letters of recommendation were handed to the court and ordered filed.

Mr. Shelloe made a statement to the Court.

Mr. O'Brien stated that Defendant had cooperated with his office in every way.

Upon being asked, Defendant stated that she had "no legal cause" to show why sentence should not now be pronounced.

It appearing to the Court that Defendant is a fit subject for probation, probation was ordered granted.

It Was, Therefore, Ordered, that Defendant be admitted to probation for a period of three (3) years, such period of time to be considered the term of probation, subject to the following conditions:

1. That she serve six (6) months of said term of probation in the San Benito County Jail and that she pay a fine of $1000 within 30 days.

2. That she abstain from the use of narcotics and intoxicating liquors, and that she refrain from frequenting places where liquor and narcotics is/are sold or dispensed at all times during the period of probation, except such restaurants and duly licensed eating establishments where she may be required to resort to for meals.

3. That she obey all laws of the United States and of the State of California, and all ordinances of any city or county in which she may be or reside.

4. That she report to the Probation Officer of San Benito County once each month, either personally or in writing, between the 1st and 10th days, setting forth her then present address, the name and address of her employer during the preceding thirty (30)

days, and any other information that may be required of her.

5. That she be entitled to all provisions of Sections 1203.1 and 1203.4 of the California Penal Code.

6. That she not, during the period of probation, absent herself from the State of California, without first having obtained permission of the Court to do so.

I hereby certify that the foregoing is a full, true and correct copy of a minute order made and entered on November 14, 1961.

Witness my hand and the seal of the Superior Court affixed this 22nd day of November, 1961.

Ralph G. Towle
County Clerk and Ex-Officio Clerk of the Superior Court of the State of California, in and for the County of San Benito.

By Vivian D. Hensen, Deputy Clerk

Appendix D

Hollister, California
Nov. 5, 1962

Regular November session of the Superior Court. Present: Hon. Edward L. Brady, Judge; Ralph G. Towle, Clerk; and John A. Lucchetti, Sheriff, when the proceedings were had, to wit:

People of the State of California vs. Mary Gonzalez Garcia	No. 1075

Defendant and her attorney Raymond Shellooe, District Attornel John H. O'Brien, Deputy District Attorney Frank Borelli and Probation Officer Curtis R. Miller were present in court.

Mr. Shellooe addressed the court.

The above entitled matter comes on at this time for hearing termination of probation and to withdraw her plea of "Guilty" to the charge in the Information therein and enter a plea of "Not Guilty" thereto.

Discussion between Court and Counsel.

Deputy District Attorney Frank Borelli had nothing further to add.

Probation Officer Curtis R. Miller recommended termination of probation and change of plea.

It being reported to the Court that Defendant has done an excellent job during her probation,

It is the order of the court that Defendant's probation be terminated at this time and she withdrew her plea of "Guilty" and entered a plea of "Not Guilty" to the charge in the Information therein.

That the action be dismissed and the record of conviction expunged.

I hereby certify that the foregoing is a full, true and correct copy of a minute order made and entered on Witness my hand and the seal of the Superior Court affixed this 5th day of November, 1962.

(Seal) Ralph G. Towle

County Clerk and Ex-Officio Clerk of the Superior Court of the State of California, in and for the County of San Benito.

By Marie Rezendes, Deputy Clerk.

Appendix E

MATTER OF A——F——

In DEPORTATION Proceedings

A-2904545

Board Decision of September 1, 1959

Decided by Attorney General October 12, 1959

Deportability—Narcotics offenses, section 241(a)(11) of 1952 act—Finality of conviction—Effect of State expungement law.

(1) Judgment of State court, after finding of guilt, that proceedings be suspended and probation granted upon condition that defendant serve one year in the county jail constitutes a "conviction" within the meaning of section 241(a)(11) of the 1952 act.

(2) Finding of deportability under section 241(a)(11) of the 1952 act based upon conviction of State narcotics offense is not affected by a technical "expungement" or erasure of conviction record, as authorized by some State statutes, upon fulfillment of conditions of probation, such as section 1203.4 of the California Penal Code or section 1772 of the Welfare and Insitutions Code. (Overrules *Matter of D——*, 7 I. & N. Dec. 670.)

CHARGE:

Order: Act of 1952—Section 241(a)(11) [8 U.S.C. 1251(a)(11)]—Convicted of narcotic violation.

BEFORE THE BOARD
(September 1, 1959)

Discussion: On September 14, 1956, we dismissed an appeal from a decision of a special inquiry officer directing the respondent's deportation. Thereafter, a suit was instituted for judicial review of the order of deportation which resulted in decisions adverse to the respondent in the United States District Court for the Southern District of California (Central Division) and in the United States Court of Appeals for the Ninth Circuit (*Arrellano-Flores v. Hoy*, 262 F.2d 667 (1958)). Counsel then filed a petition for certiorari in the Supreme Court of the United States which is now pending.* On May 6, 1959, he filed a motion addressed to this Board seeking reconsideration of our decision of September 14, 1956. In our order of June 24, 1959, we denied this motion and affirmed our previous order. On July 14, 1959, the Service requested that the case be referred to the Attorney General for review of the Board's decision pursuant to 8 CFR 3.1(h)(1)(iii).

The respondent is a 55-year-old married male, native and citizen of Mexico, who last entered the United States about June 13, 1954, as a returning resident. He has resided in the United States since 1925 when he was admitted for permanent residence. On March

*Cert. den. 362 U.S. 921 (1960).

9, 1956, a judge of the Superior Court of California found the respondent guilty of a violation of section 11500 of the Health and Safety Code of that State in that he did "sell, furnish and give away flowering tops and leaves of Indian Hemp" also known as *cannabis sativa* or marihuana. On April 6, 1956, the court directed that proceedings be suspended and that probation be granted for five years, one of the conditions of probation being that the respondent serve one year in the county jail. It was on the basis of this conviction that the special inquiry officer and this Board held that the respondent was deportable under 8 U.S.C. 1251(a)(11).

The respondent's counsel stated in his motion of May 6, 1959, that it was predicated on *Matter of D——*, 7 I. & N. Dec. 670, formerly Int. Dec. No. 916, decided March 6, 1958. His position was, in effect, that *Matter of D——* required termination of this deportation proceeding, and he also contended that there had been no final judgment of conviction in the respondent's case. In our decision of June 24, 1959, we explained why the facts in *Matter of D——, supra,* were not analogous to those relating to the respondent, and we affirmed our previous order in which we had held this respondent deportable. The sole contention raised in the Service motion of July 14, 1959, is that there is a conflict between the decision in the respondent's case and the decision in *Matter of D——, supra.* While not specifically stated in the motion of July 14, 1959, it is apparent that the Service agrees with our *decision* that this respondent is deportable and agrees

with the statements which we made in our order of June 24, 1959, that there was a final judgment of conviction in the respondent's case. The motion contains the statement that it is the view of the Service that *Matter of D——, supra,* erroneously states the law, and the Service obviously urges the overruling of that decision.

Matter of D——, supra, involved an alien who was approximately 17 years old at the time of his conviction, and he was treated as a youthful offender. About one year after the conviction, and pursuant to section 1772 of the Welfare and Institutions Code of California, the court entered an order setting aside the alien's plea of guilty and dismissing the information. We did not, as asserted by the Service in its motion, state in our previous order that the conviction was expunged under section 1203.4 of the California Penal Code. We did state that, although the present respondent was 51 years old when the narcotic violation was committed, we did not regard this factor as distinguishing the case from *Matter of D——* because of the possibility that this respondent might at some future date have his conviction set aside under section 1203.4 of the California Penal Code. Section 1772 of the Welfare and Institutions Code and section 1203.4 of the California Penal Code were quoted in footnotes 1 and 2 of the decision in *Matter of D——*. They are substantially similar in their provisions that, under specified conditions, the court may set aside the verdict of guilty and dismiss the accusation or information. Section 1772 is limited to youthful offenders. Since only

section 1203.4 would have any relevance in this respondent's case, we will discuss the question under that statutory provision although our statements would be equally applicable to section 1772.

Section 1203.4 of the California Penal Code provides, in part, as follows:

> Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. * * * provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

The proposition urged by the Service in its motion of July 14, 1959, is that an alien convicted of a crime which rendered him deportable continues to be deportable on the basis of that conviction even after the court has set aside the conviction under section 1203.4 of the California Penal Code. While the motion discusses only this statutory provision of California, acceptance of the proposition advanced by the Service

would logically require a conclusion that the setting aside of a conviction, in accordance with similar statutory provisions of other States, likewise would be ineffective to prevent deportation.

Matter of P——, 5 I. & N. Dec. 392 (1953), involved the question of whether there had been a conviction for immigration purposes under the following circumstances. The alien, in a Massachusetts criminal proceeding, had been sentenced to imprisonment for one year and the sentence was suspended. After the expiration of one year the sentence was revoked and the case was placed on "file". We held that there was a conviction rendering him deportable. The lower courts agreed that this alien was deportable but the Supreme Court reversed, stating that it was unable to say the conviction had attained such finality as to support an order of deportation (*Pino v. Landon,* 349 U.S. 901 (1955)). Thereafter, we held in another Massachusetts case that the conviction was insufficient for deportation purposes where, after completion of probation, the sentence was revoked and the complaint was dismissed (*Matter of G——*, 7 I. & N. Dec. 171 (1956)).

In a case where the conviction is expunged under section 1203.4 of the California Penal Code, the plea of guilty is withdrawn or the verdict of guilty is set aside and thereupon the accusation or information against the defendant is dismissed. If the Supreme Court was unable to find finality of conviction in *Pino v. Landon, supra,* where only the *sentence* was revoked, we do not understand how the Service can

maintain that there is finality of conviction in a case under section 1203.4 where the verdict of guilty is set aside and the accusation is dismissed. In such a case, not only is there no finality of conviction, but there is in contemplation of law no conviction whatever.

In re Ringnalda, 48 F. Supp. 975 (S.D. Cal., 1943), related to the question of whether an alien was qualified for naturalization, and the particular point discussed was the effect of the expungement of a conviction under section 1203.4 of the California Penal Code. It was stated (p. 976) that, through these proceedings, the defendant stands cleared of guilt, and the court cited with approval a California decision which had held that the intention of the legislature was to wipe out absolutely the entire proceedings and to place the defendant in the position which he would have occupied if no accusation or information had ever been presented against him.

It might be assumed from the motion of the Service that *Matter of D——, supra,* formulated some new policy of terminating deportation proceedings where the record of conviction had been expunged. Actually, that is not the case. On the contrary, it has been the established and accepted view of the Service and of this Board for many years that in cases where a court has expunged the record of an alien's conviction, the conviction cannot thereafter serve as the basis for deporting the alien or excluding him. In its request of July 14, 1959, the Service urges only that *Matter of D——, supra,* be overruled. However, in reality, it is seeking to overthrow the long-standing practice we

have mentioned without even commenting on its existence. The cases next cited confirm the existence of this rule.

In *Matter of G——*, 1 I. & N. Dec. 96, a decision approved by the Attorney General on January 14, 1942, there was involved article 780 of the Texas Code of Criminal Procedure which permits certain defendants to move for a new trial and dismissal of the case after the expiration of time assessed as punishment by the jury. There, following the conclusion of the deportation hearing and pursuant to this statutory provision, the Court entered an order granting a new trial to the alien and dismissing the cause. We said (at p. 97) that deportation could not be ordered on the basis of the *conviction* of crime because "today there is not outstanding a conviction of the respondent for this crime." Since there was in that case no further discussion of this matter, it seems obvious that the proposition that the expungement of a conviction rendered the conviction ineffective to support an order of deportation was believed no longer open to question at the time of our decision in that case in 1941. The only question which it was considered necessary to discuss there was whether the alien's original plea of guilty to the offense constituted an *admission* of the crime for immigration purposes.

Article 780 of the Texas Code of Criminal Procedure was also pertinent to the decision in *Matter of L——R——*, 7 I. & N. Dec. 318. In that case, sentence was suspended on recommendation of the jury. On February 18, 1957, the Attorney General ordered ter-

imination of the deportation proceeding and held that the conviction lacked finality. There, the period of punishment assessed had not expired and the conviction had not been expunged when the case was considered by the Attorney General, but the decision turned on the specific language of Article 778 of the Texas law, relating to suspended sentences, which is to the effect that neither a verdict of conviction nor the judgment entered thereon becomes final unless there has been a final conviction for another felony during the period of suspension of the sentence. Similar language is not contained in the California statute under discussion. However, if the conviction lacked finality under the circumstances present in *Matter of I——N——*, *supra*, the Service can hardly be correct in its view that there was a final conviction in *Matter of D——*, *supra*, since in that case the conviction had already been expunged at the time the case was considered.

In *Matter of O——T——*, 4 I. & N. Dec. 265, which was a decision by the Central office of the Service in 1951, it was stated at page 266, "The Service and the Board of Immigration Appeals have held in numerous cases that the proceedings under Section 1203.4 [of the California Penal Code] expunge the record of conviction and that *thereafter* it may not serve as the basis for an order of deportation" (emphasis supplied). The cases cited in that decision show that this had been the rule concerning Section 1203.4 since at least 1943, and the matter was so well settled that the only reported cases are those dealing with possible

exceptions to the rule. In addition to *Matter of O—— T——*, *supra*, the existence of the rule is illustrated by *Matter of E—— V——*, 5 I. & N. Dec. 194 (1953); *Matter of H——*, 6 I. & N. Dec. 619 (1955); and *Matter of N—— H——*, 7 I. & N. Dec. 495 (1957), in all of which section 1203.4 of the California Penal Code was involved.

In *Matter of D——*, *supra*, which the Service says is in conflict with the decision in the respondent's case, the special inquiry officer, in terminating the deportation proceeding, also referred to the well-settled rule mentioned above and stated that section 1203.4 of the California Penal Code had "uniformly been held to expunge and remove the conviction as a basis for deportation." In our decision of March 6, 1958, in that case, we stated (p. 674) that the action taken by the California Court removed the alien's conviction as a basis for deportation, and we affirmed the special inquiry officer's order terminating the proceeding. If this Board erroneously stated the law in *Matter of D——*, *supra*, as contended in the present motion, we do not understand why the Service did not even file a motion for reconsideration of that decision at the time it was rendered.

When the Service urged, in *Matter of D——*, *supra*, that the special inquiry officer had erred in terminating the deportation proceeding, this was based on the fact that the alien was charged with being deportable under 8 U.S.C. 1251(a)(11) and that 8 U.S.C. 1251(b), as amended July 18, 1956 (1958 ed.), provided, in effect, that a *pardon* would not relieve from

deportation an alien deportable under 8 U.S.C. 1251 (a)(11). It was contended by the Service that an expungement of the record of conviction in California was the equivalent of a pardon and that, therefore, expungement of the conviction did not relieve the alien from liability to deportation. That was the sole argument advanced by the Service in that case. The Service made no attempt there to contradict the special inquiry officer's statement that the expungement of a conviction in California had uniformly been held to remove the conviction as a basis for deportation, nor did it request repudiation of the rule. On the contrary, *Matter of D——, supra,* would seem to indicate acquiescence of the Service in the rule as to deportation under 8 U.S.C. 1251(a)(4) for convictions involving moral turpitude with a request for an exception to the rule in the cases of deportations under 8 U.S.C. 1251 (a)(11) relating to narcotic convictions.

On page 2 of its motion, the Service quoted a statement from *Arrellano-Flores v. Hoy, supra,* at page 668, which is to the effect that the Court could not ignore what transpired in the criminal proceedings but that possibly Congress intended to do its own defining (of "convicted") rather than leaving the matter of what constituted a conviction for determination under the statute of the particular state. Actually, the word "convicted" is not one of the terms which was defined in 8 U.S.C. 1101, but the decision in *Pino v. Landon, supra,* must be considered, of course, an interpretation of "convicted" limiting it to convictions which have sufficient finality.

The opinion of the Court of Appeals in this respondent's case shows that the statement quoted by the Service related to a contention of the respondent based on a decision of the Seventh Circuit that one Freislinger had not been convicted under Illinois law because a final judgment of conviction had not been entered. In holding that this respondent had been "convicted," the Court of Appeals did not base its decision upon the proposition that the provisions of the California statute or what transpired in the criminal proceedings should be disregarded. On the contrary, in the next paragraph following the one quoted by the Service, the Court of Appeals stated that California would consider that on this record there was a conviction. Parenthetically, we observe that the Court had also stated at page 667 of the opinion that under California law such a sentence as was prescribed with respect to this respondent does not constitute a final judgment from which an appeal may be taken, citing *In re Marquez,* 45 P. 2d 342. That case was decided in 1935. However, section 1237 of the California Penal Code, as amended in 1951, relating to cases in which the defendant may appeal, contains the specific statement, "an order granting probation [which is what occurred in the respondent's case] shall be deemed to be a final judgment within the meaning of this section."

With reference to the above-mentioned quotation by the Service from the opinion of the Court of Appeals, it is followed by this statement in the motion of July 14, 1959: "It is the Service view that this

statement correctly reflects the Congressional intent, and that a conviction has occurred within the meaning of the immigration laws, notwithstanding subsequent legal process under the California statutes whereby this record of conviction ceases to exist for some purposes." On page 3 of the motion it is stated that, "in asserting that an alien is properly held not deportable where the conviction has been expunged, the Board has asserted a legal principle contrary to that set forth in the Ninth Circuit in the instant case." We consider it appropriate to comment on two matters raised by these statements of the Service.

In the first place, we understand from the two statements mentioned above that it is the view of the Service that *Arrellano-Flores v. Hoy, supra,* holds that this respondent will continue to remain deportable even if his conviction should hereafter be expunged under section 1203.4 of the California Penal Code. However, the decision of the Court of Appeals shows that it did not even consider the effect of a possible expungement of the record of conviction.

The Court of Appeals stated in its opinion (p. 667) that the principal issue was whether the alien had been "convicted"; that the judgment of the State Court was that the proceedings be suspended and that probation be granted upon the condition that the alien serve one year in the county jail; and that, because of this "rubbery end" to the trial, the alien says he has not been "convicted" but just found guilty. In other words, the respondent's contention before the Court of Appeals had nothing to do with section 1203.4 but

only with his claim that he had not been convicted because, although he was required to serve one year's imprisonment, the State Court had actually suspended the imposition of sentence. (We had previously held in *Matter of O——*, 7 I. & N. Dec. 539 (1957), that there was finality of conviction where imposition of sentence was suspended.) Since counsel, before the Court of Appeals, did not even raise his contention that the respondent should not be deported because of the possibility that he might be able to have the record of conviction expunged at some future date and inasmuch as that question was not considered by the Court of Appeals, we believe it is clear that the decision in *Arrellano-Flores v. Hoy, supra,* cannot be considered as offering any support for the contention of the Service that an alien remains deportable after his conviction has been expunged.

Our second comment concerning the two statements of the Service mentioned above is with respect to that part which is to the effect that, when a conviction has been expunged under section 1203.4 of the California Penal Code, it "ceases to exist *for some purposes.*" Section 1203.4 specifically provides that upon the Court's dismissal of the accusations or information against the defendant, he "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." The comprehensive language which was used does not indicate that the conviction ceases to exist only for some purposes. The one statutory exception is contained in the proviso quoted above, which is part of section

1203.4, to the effect that in any subsequent prosecution the prior conviction may be pleaded and proved and shall have the same effect as if the information had not been dismissed.

The Service also stated that this Board has recognized that the expunging of the record of conviction in California does not completly obliterate the fact that the unlawful acts occurred, citing *Matter of H——*, 6 I. & N. Dec. 619; *Matter of S——R——*, 7 I. & N. Dec. 495; and *In re Paoli,* 49 F. Supp. 128 (N.D. Cal., 1943). The statement itself is correct and we agree that we have said this.

The statement mentioned in the preceding paragraph appears to have been first discussed in *Matter of O——T——*, 4 I. & N. Dec. 265 (1951). There an alien was convicted of petty theft in 1940 and in 1949 deportation proceedings were instituted on the basis of this conviction. Thereafter, the conviction was expunged under section 1203.4 of the California Penal Code. After commenting upon the fact that it had been held in numerous cases that following such expungement the record of conviction could not serve as the basis for deportation, it was stated that reconsideration of the question had been requested by a reviewing officer because of the decision of the Supreme Court of California in *Meyer v. Board of Medical Examiners,* 206 P. 2d 1085 (1949). The *Meyer* case involved suspension of a physician's license and the Court had said that the expungement of a conviction does not obliterate the fact that there has been a final adjudication of guilt of the crime. *Matter of O——T——*,

supra, was a decision of the Central Office of the Service and, after reviewing a number of California cases, the final conclusion was that no change was warranted in the view that the deportation charge is not sustained where the record of conviction has been expunged. Since the Service itself considered the issue raised by the *Meyer* case when it decided in 1951 to adhere to the previous practice, there is an incongruity connected with the Service now bringing up the same factor in urging reversal of the well-settled rule that an alien is not deportable on the basis of a conviction which has been expunged.

Although we said in *Matter of H——, supra,* and *Matter of S——R,——supra,* that the expunging of the record of conviction does not completely obliterate the fact that the unlawful acts occurred, it is significant that each case clearly shows that no change was being made in the rule which had been in effect since at least 1943 that a deportation charge is not supported by a record of conviction which has been expunged. *Matter of H——, supra,* even went a step beyond this. There the alien had been convicted of two offenses involving moral turpitude during the preceding five years and the records of conviction had been expunged under section 1203.4 of the California Penal Code. In that case there was no attempt to predicate a deportation charge on the expunged convictions, and the question involved was whether, under section 101(f)(3) of the Immigration and Nationality Act [8 U.S.C. 1101(f)(3)], the alien was precluded from establishing good moral character because of the

two offenses which he had committed during the five-year period. We held that the expungement of the convictions removed the statutory bar to proving good moral character and we found the alien eligible for voluntary departure. Our decision was approved by the Attorney General on October 18, 1955.

We do not consider that *In re Paoli, supra,* is of any value in supporting the present position of the Service. That case involved an applicant for naturalization. The Court held that an expunged conviction could be considered on the question of whether the applicant had established good moral character but a principal reason for the conclusion was that the Court, in naturalization cases, could find lack of good moral character merely on the basis of unlawful acts committed by the applicant regardless of whether the applicant had ever been prosecuted therefor.

On pages 2 and 3 of its motion, the Service refers to the fact that an offense which has been expunged may be pleaded and proved during the prosecution of a second offense and, as we have indicated above, this is a specific provision of section 1203.4 of the California Penal Code. The Service then says: "If so pleaded and proved, it would, in the Board view, have the incidental effect of resurrecting deportability." There is also a reference to the "vacillating rule" of the Board. We believe the Service is well aware that we have not held, nor have we said, that an alien who was not deportable on the basis of an expunged conviction, becomes deportable on the same conviction if

the first conviction was pleaded and proved in a second prosecution. Actually, in *Matter of S——R——*, 7 I. & N. Dec. 495, it was the Service which argued that, in accordance with the proviso of section 1203.4, a subsequent prosecution automatically revived an expunged conviction. We declined there to follow that view. Under the circumstances, these remarks of the Service are unwarranted.

The Service also referred to our interpretation of a Federal statute "in which the Congress saw fit to state that an alien who had committed the particular crime or crimes, and as to whom the judicial process has acted with sufficient finality to adjudicate the issue that he was in fact guilty of that crime, was not a proper person to continue to reside in this country." The statutory provision on which this deportation is predicated is section 241(a)(11) of the Immigration and Nationality Act [8 U.S.C. 1251(a)(11)] and the part which is pertinent to this case is that requiring the deportation of an alien "* * * who has been convicted of a violation of * * * any law * * * controlling the * * * sale * * * of * * * marihuana * * *." The Congress did not define "convicted" nor does the statute contain any of the language which the Service seeks to ascribe to the Congress. The question under 8 U.S.C. 1251(a)(11) is simply whether an alien has been "convicted" of any of the narcotic offenses mentioned therein and whether there is finality of conviction in accordance with *Pino v. Landon, supra.* We have held that this respondent was convicted and that he is deportable. Where the record of conviction has

been expunged, as in *Matter of D——, supra,* it is our considered opinion that the expunged conviction cannot support, an order of deportation. We hold, therefore, that *Matter of D——, supra,* was correctly decided and that no change is warranted in that decision.

We turn now to the contention of the Service that there is a conflict between our decision concerning this respondent and the decision in *Matter of D——, supra.* Our position is (1) that an alien may be deported even though there is a possibility that at some future date he might be able to secure the expungement of his conviction under the law of the state where the conviction occurred, and (2) that an alien is not deportable on the basis of a conviction which has been expunged. This is the distinction between the two cases. In the respondent's case, the conviction has not been expunged, and there is no assurance that it ever will be expunged. Accordingly, we hold that he is deportable. In *Matter of D——, supra,* the conviction had been expunged and we held, therefore, that he was not deportable. The Service understands that we had made this distinction in our previous order. However, its motion of July 14, 1959, seems to indicate that the Service believes there is something anomalous about the fact that an alien can be deported before his conviction is expunged but the same alien for the same crime cannot be deported after the conviction has been expunged. Apparently this is advanced as an argument why there is a conflict between the two decisions. However, in view of the distinction between the two

cases which we have pointed out, we do not consider that there is a conflict nor that the argument is a valid one.

A situation similar to the foregoing is present in every deportation under 8 U.S.C. 1251(a)(4) predicated on conviction for a crime involving moral turpitude. There, deportation is lawful if the alien is deported before he can secure a pardon for the crime, but, if a deportation proceeding is instituted and the alien then obtains a pardon during the pendency of the proceeding, he cannot thereafter be deported on the basis of the pardoned crime. As we stated in our previous order, there have been many cases in which aliens have been found deportable under 8 U.S.C. 1251 (a)(4) and subsequently obtained pardons after which the deportation proceedings were terminated. In *Houvardas v. Wixon,* 169 F.2d 980 (C.A. 9, 1949), cert. den. 336 U.S. 913, it was held that the alien was deportable although he was eligible for a pardon and the Court apparently believed that the delay in securing a pardon was not the fault of the alien. In *Matter of R——R——*, 7 I. & N. Dec. 478 (1957), we held, with respect to a Texas statutory provision similar to section 1203.4 of the California Penal Code, that the fact that the conviction may be expunged upon satisfactory fulfillment of the conditions of probation does not affect the finality of the conviction during the period of probation. Hence, these cases illustrate the invalidity of the Service view that there is something repugnant about the fact that an alien can be deported prior to the expungement of the conviction and cannot

be deported if the conviction has been expunged before deportation takes place.

As we have indicated above, our position that an alien cannot be deported after the conviction has been expunged is not something which originated in *Matter of D——, supra,* but was acknowledged by the Service as being well settled when it decided in 1951 in *Matter of O——T——, supra,* that no change was warranted in that rule. On the other hand, the fact that there is a possibility that an alien's conviction may be expunged at some future date has not heretofore deterred the Service from instituting deportation proceedings. For example, that is the situation in this respondent's case; in *Matter of O——T——, supra,* the decision shows that, after the deportation proceeding had been instituted, the record of conviction was expunged and the proceeding was then terminated; and that was true also with respect to *Matter of D——, supra,* in which the record of conviction was expunged on August 31, 1957, and the special inquiry officer's decision in that case shows that the order to show cause instituting the proceeding was served prior thereto—on March 12, 1957.

In disagreeing with the proposition that an alien's deportability may depend upon whether he succeeds in having his conviction expunged before deportation takes place, the Service speaks of the "procedural requirements" of the California statute coming into play as though every defendant who has completed his probation is entitled to have the conviction expunged. It is clear from section 1203.4 of the Califor-

nia Penal Code that such is not the case because it is specifically limited to a defendant "who has fulfilled the conditions of his probation *for the entire period thereof,* or who shall have been discharged from probation prior to the termination of the period thereof." Hence, if a defendant is not within either of these categories, he is not entitled to have his conviction expunged.

The present respondent was on April 6, 1956, placed on probation for five years. We do not know whether he has thus far fulfilled the conditions of his probation or whether he will continue to do so until the expiration of five years on April 6, 1961. For that reason, we said in our order of June 24, 1959, that section 1203.4 of the California Penal Code does not assure the respondent that his conviction will be set aside, and the mere fact that such a possibility exists does not seem to us a proper basis for terminating this deportation proceeding as counsel for the respondent requested.

For the reasons stated above, we hold that there is no conflict between the rule which has been in effect since 1943 concerning section 1203.4 of the California Penal Code (or *Matter of D——, supra*) and the decision which was rendered in the respondent's case. We adhere to the 1943 rule that a conviction which has been expunged will not support an order of deportation. While counsel for the respondent had also claimed that there was a conflict between the decision in the respondent's case and the decision in *Matter of D——, supra,* his position was the opposite of that

urged by the Service, that is, counsel contended that *Matter of D——, supra,* had been correctly decided and that it required termination of the proceedings against this respondent. Our reasons for rejecting his contentions are set forth fully in our order of June 24, 1959, and need not be further discussed. The Service has not expressed disagreement with any of the statements which we made in our previous order in connection with our rejection of counsel's contentions except regarding the question of whether there was a conflict between *Matter of D——, supra,* and the decision in the respondent's case. That point was discussed in the decision of June 24, 1959, as well as in the present order. As requested by the Service, this case will be certified to the Attorney General.

ORDER: It is ordered that our orders of September 14, 1956, and June 24, 1959, be affirmed.

It is further ordered that this case be referred to the Attorney General for review under 8 CFR 3.1 (h) (1) (iii) in accordance with the request of the Service.

BEFORE THE ATTORNEY GENERAL
(October 12, 1959)

The Board of Immigration Appeals, at the request of the Commissioner of Immigration and Naturalization, has referred to me for review, as provided by 8 CFR 3.1 (h) its order of September 14, 1956, dismissing the respondent's appeal from the order of a special inquiry officer directing his deportation and its order of June 24, 1959, denying respondent's motion for reconsideration.

The special inquiry officer directed the respondent's deportation on the ground that he was an alien who had been convicted of a narcotic offense. Section 241 (a)(11) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(a)(11), provides in pertinent part for the deportation of any alien:

> * * * who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of (specified narcotic drugs) * * *.

On November 14, 1955, an accusation was filed against respondent in a Superior Court of the State of California charging him with having unlawfully sold, furnished, and given away, flowering tops and leaves of Indian hemp (*cannabis sativa*) (marihuana) in violation of section 11500 of the California Health and Safety Code. After trial respondent was found guilty of the offense, and on April 6, 1956, the Court entered the following order:

> Proceedings suspended, Probation granted for five years, condition, one year County Jail; residence and employment to be approved by Probation Officer; no narcotics; stay away from per-

sons and places where narcotics are used; obey all laws and rules of Probation Department.[1]

The respondent has served one year in the county jail; his term of probation will not expire until April 6, 1961. The Board of Immigration Appeals dismissed respondent's appeal from the order of deportation without opinion.

Respondent thereupon instituted an action in the United States District Court for the Southern District of California challenging the validity of the deportation order. The district court upheld the order. The judgment of the district court was affirmed by the Court of Appeals for the Ninth Circuit (*Arrellano-Flores v. Hoy*, 262 F.2d 667 (1958)). The Court of Appeals stated that the respondent's principal contention was that he had not been "convicted" within the meaning of section 241(a)(11) of the Immigration and Nationality Act since "(t)he judgment of the state court, after the finding of guilt, was that the proceedings be suspended and that probation be granted upon the condition that appellant serve one year in the county jail." The Court rejected this contention, holding that whatever might be the state law as to whether there had been a conviction Congress

[1]Section 1203.1 of the California Penal Code provides that the Court, in ordering probation, may suspend the imposing or the execution of the sentence and may direct that such suspension shall continue for a period not exceeding the maximum possible term of the sentence, and that as a condition of probation may imprison the defendant in the county jail for a period not exceeding the maximum time fixed by law "in the instant case."

intended the question to be determined by reference to federal law. The Court stated (p. 668):

> While one cannot close one's eyes to the state's statutes and what transpired in the state's proceedings, we are inclined to the belief that perhaps here Congress intended to do its own defining rather that leave the matter to the variable state statutes. Credence for this view can be found in the fact the present statute reads "convicted" while its predecessor, 46 Stat. 1171 (Chap. 224), read "convicted and sentenced."[2] It would appear that federal courts have generally taken the view that a plea of guilty or a finding of guilty, which is in repose and remains undisturbed, amounts to a conviction. See *Kercheval v. United States*, 274 U.S. 220.
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> But if our question is whether California would consider on this record there was a conviction then it is clear that California has answered in the affirmative. *In re Morehead*, 107 Cal. App. 2d

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[2]The reference to the predecessor statute is to the Act of February 18, 1931, 46 Stat. 1171. The words "and sentenced" were eliminated in 1940, 54 Stat. 673. That act also extended deportability to aliens convicted of a violation of state as well as federal narcotic laws. These changes were carried forward into the 1952 act. The legislative history of the 1940 amendments does not disclose any specific discussion as to the change from "convicted and sentenced" to "convicted." See Hearings before a Subcommittee of the Senate Judiciary Committee, 76 Cong., 3d Sess., on H.R. 5138, 76th Cong., H.R. Rept. Nos. 994, 2683, S. Rept. No. 1796, 86 Cong. Rec. 8340-49, 9029-36.

A further amendment was made by the Narcotic Control Act of 1956, 70 Stat. 575, to provide that a pardon was not to relieve from deportability an alien otherwise deportable because of conviction of a narcotic offense. See Gordon and Rosenfield, *Immigration Law and Procedure*, § 4.17.

346, 237 P. 2d 335; *People v. Christman*, 41 Cal. App. 2d 158, 106 P. 2d 32.[3]

The respondent thereupon filed a petition in the Supreme Court for a writ of certiorari. That petition is now pending.[*] In May 1959, the Solicitor advised the Court that after the petition had been filed, "it was discovered that the Board of Immigration Appeals had rendered a decision (*Matter of D——*, 7 I. & N. Dec. 670 (March 6, 1958)), subsequent to the decision in this case, which may be inconsistent therewith since it expressed the view that a person who is "released from all penalties and disabilities pursuant to section 1203.4 of the California Penal Code, after a period of probation,[4] is not a person 'convicted' for the purposes of deportation." It was further stated that on the basis of the latter decision the petitioner (the respondent herein) had moved the Board for

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[3]The Court of Appeals stated (p. 667), citing *In re Marquez*, 3 Cal. 2d 625, 45 P. 2d 342 (1935), that under California law "such a sentence as was prescribed here does not constitute a final judgment from which an appeal may be taken." The court apparently overlooked the 1951 amendment of § 1237 of the California Penal Code, which now expressly provides that an order granting probation "shall be deemed to be a final judgment" for purposes of appeal. See *People v. Hedderly*, 43 C. 2d 476, 274 P. 2d 857 (1954).

[*]Cert. den. 362 U.S. 921 (1960).

[4]Section 1203.4 provides that a defendant who has fulfilled the conditions of his probation may be permitted by the court "to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."

reconsideration; and in view of the fact that "the administrative position as to the effect of a California judgment of probation is thus presently under re-examination," the Court was requested to defer action on the petition until after the ultimate determination of petitioner's motion for reconsideration.

On June 24, 1959, the Board denied respondent's motion for reconsideration. The Board held that its decision in *Matter of D——, supra,* did not require a different determination in respondent's case, stating that while the cases were similar in both involved like statutes, namely § 1772 of the California Welfare and Institutions Code and § 1203.4 of the Penal Code,[5]—

> * * * we are convinced that there is no statutory authorization for complying with counsel's request that the deportation proceeding be termi-

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[5]In *Matter of D——*, 7 I. & N. Dec. 670, the respondent, as in this case, was charged with being deportable pursuant to § 241 (a)(11) of the Immigration and Nationality Act in that he had been convicted in California for unlawfully selling marihuana. By order dated June 20, 1956, the court committed the respondent to the Youth Authority of California for the term prescribed by law. Section 1772 of the Welfare and Institutions Code provides that in the case of a person honorably discharged from control by the Youth Authority, the court which committed him may set aside the verdict of guilty and dismiss the accusation or information and he "shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he was committed." During the pendency of the deportation proceeding the court entered an order pursuant to § 1772, setting aside the respondent's plea of guilty and dismissing the information. The special inquiry officer terminated the deportation proceeding on the ground that as a consequence of the proceedings under § 1772 the respondent no longer stood convicted of the crime upon which the deportation proceeding was based. The Immigration and Naturalization Service contended before the Board of Immigration Appeals that a § 1772 "expungement of the conviction" is equivalent to a pardon and, accordingly, that the respondent re-

> nated in the respondent's case on the basis of the possibility that at some future date he might have his narcotic conviction set aside. The situation is different when a record of conviction *has already been expunged* in California because, in such a case, there is *no conviction whatever* to support an order of deportation. (Emphasis by the Board.)

Referring to respondent's contention that the state Court conviction lacked finality because the imposition of sentence had been suspended, the Board said:

> * * * The opinion of the Court of Appeals for the Ninth Circuit shows that it was fully aware of the judgment of the state Court inasmuch as there is a recital of the fact that the state Court had ordered that the proceedings be suspended and that probation be granted upon the condition that the respondent serve one year. It was this exact question which was considered by the United States Court of Appeals and it concluded that the respondent had been "convicted" within the meaning of 8 U.S.C. 1251(a)(11). * * *

On July 14, 1959, the Commissioner of Immigration and Naturalization requested the Board to refer the case to the Attorney General for review. The Commissioner, stating that "administrative renconsidera-

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mained deportable since the 1956 amendment to § 241(a)(11) (see Footnote 2, *supra*) removed a pardon as the basis for relief from deportation thereunder. The Board rejected this contention, stating that the question was not one of a pardon but rather of conviction and that the respondent had not been convicted within the meaning of § 241(a)(11).

Matter of D——, supra, was not referred to the Attorney General for review of the Board's decision.

tion" had been sought so that the Board might have "an opportunity to consider an apparent conflict in its decisions, and to clarify the Attorney General's position with respect to the issue involved," asserted that the factual distinction relied upon by the Board to support its holding in *Matter of D——, supra,* had no legal significance. The Commissioner argued that a correct interpretation of § 241 (a)(11), reflected in the opinion of the Court of Appeals, was that "a conviction has occurred within the meaning of the immigration laws, notwithstanding subsequent legal process under the California Statutes whereby this record of conviction ceases to exist for some purposes." And he continued:

> It is, therefore, the Service view that *Matter of D——* erroneously states the law. It is further the Service view that the order entered by the Board on June 24, 1959, in no way resolves a conflict of law between that case and the instant case, since in asserting that an alien is properly held not deportable where the conviction has been expunged, the Board has asserted a legal principle contrary to that set forth in the Ninth Circuit in the instant case. Accordingly, since the issue is one which must be resolved in order that appropriate action may be taken in connection with the petition for certiorari to the Supreme Court (sic), it is requested that the case be certified to the Attorney General.

In referring the case to me for review, the Board has adhered to its view that the distinction between *Matter of D——, supra,* and this case is a valid one,

and is consistent with the opinion of the Court of Appeals. The Board also states that acceptance of the Commissioner's view "would logically require a conclusion that the setting aside of a conviction, in accordance with similar statutory provisions of other States, likewise would be ineffective to prevent deportation," thus overturning a long-established administrative practice.

The special inquiry officer, the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals, the District Court, and the Court of Appeals are in agreement that the respondent was convicted of a narcotic violation within the meaning of § 241 (a)(11) of the Immigration and Nationality Act. I am in accord. I, therefore, affirm the order of the Board dismissing the respondent's appeal and denying his petition for reconsideration. However, it is my view that for the purpose of § 241 (a)(11) it is immaterial that pursuant to a state statute like § 1203.4 of the California Penal Code or § 1772 of the Welfare and Institutions Code the verdict of guilty has been set aside and the criminal charge dismissed. I, therefore, disagree with the Board that in such cases "there is no conviction whatever to support an order of deportation." I limit my disagreement to the precise issue presented—namely, a deportation proceeding brought under § 241 (a)(11), as it may be affected by state laws of the nature of the California statutes considered herein.

The history of § 241(a)(11) convinces me that Congress did not intend that aliens convicted of narcotic

violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction. Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strengthened the deportation laws dealing with aliens involved in such traffic. Thus, as indicated above (footnote 2), in 1940 the deportation statute was amended to eliminate the requirement that in addition to a conviction there must be a sentence. At the same time the statute was extended to convictions for violation of State as well as Federal statutes. And, since the 1956 amendment an alien may no longer escape deportability by proffering a pardon. In the face of this clear national policy, I do not believe that the term "convicted" may be regarded as flexible enough to permit an alien to take advantage of a technical "expungent" which is the product of a state procedure wherein the merits of the conviction and its validity have no place. I believe that Congress intended the inquiry to stop at the point at which it is ascertained that there has been a conviction in the normal sense in which the term is used in Federal law. See *Berman v. United States*, 302 U.S. 211 (A defendant is convicted even though the trial court, after imposing sentence, has placed the defendant on probation). Of course, if the conviction is still subject to reversal by the usual processes of appellate scrutiny, the statute is not satisfied. But beyond this I do not think the inquiry can extend, consonant with the Congressional purpose and policy. I, therefore, regard it as immaterial for the purposes

of § 241 (a)(11) that the record of conviction has been cancelled by a state process such as is provided by § 1203.4 of the California Penal Code and by § 1772 of its Welfare and Institutions Code.

Moreover, to follow the Board's view would make the deportability of the alien depend upon the vagaries of state law. It has been said that only in California and a few other States is provision made for the cancellation of a record of conviction or for the withdrawal of a plea of guilty, upon the termination of probation. *Probation and Related Measures* (U.N. Publication No. 1951, IV, 2) 106. And § 1203.4 of the California Penal Code (and presumably § 1772 of the California Welfare and Institutions Code) has been characterized as "without parallel in the legislation of any other state" in providing for a release of the probationer from all penalties and disabilities resulting from conviction. 2 Stan. Law Rev. 221, 222 (1949). It is hardly to be supposed that Congress intended, in providing for the deportation of aliens convicted of narcotic violations, to extend preferential treatment to those convicted in the few jurisdictions, which, like California, provide for the expungement of a record of conviction upon the termination of probation.

Appendix F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES EDWARD KELLY, *Petitioner,* vs. IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*	No. 19,340

[June 29, 1965]

Petition to Review an Order of Deportation of the Immigration and Naturalization Service

Before: BARNES and ELY, Circuit Judges; and PENCE, District Judge

BARNES, Circuit Judge:

This is a petition to review an order of deportation affirmed by the Board of Immigration Appeals. We have jurisdiction pursuant to § 1105(a) of Title 8, United States Code.

The sole issue here involved is whether petitioner has "at any time . . . been convicted" within the contemplation of 8 U.S.C. § 1251(a)(11),[1] after conviction and sentence by the courts of the State of California for violating § 11531 of the Health and

[1]Title 8 U.S.C. § 1251(a)(11) (Section 241(A)(11)) of the Immigration and Nationality Act reads in pertinent part:

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(11) is, or hereafter at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession or traffic in narcotic drugs or marijuana, or who has been convicted of a violation of . . . any law or regulation governing or controlling the . . . sale, exchange, dispensing, giving away . . . of marijuana . . . ."

Safety Code (possession or sale of marihuana), when a so-called "expungement" of the conviction has taken place under § 1203.4 of the California Penal Code.[2]

We have withheld decision in this case pending the determination by another panel of this court of the appeal in *Maria Garcia-Gonzales v. Immigration and Naturalization Service*, No. 18375, decided April 28, 1965. Decision therein was delayed pending the Supreme Court decision (as to jurisdiction) in *Giova v. Rosenberg* (decided October 26, 1964), 379 U.S. 18. The *Garcia-Gonzales* case is substantially similar to this case on its facts, except that it involved a conviction under §§ 11500 and 11501 of the California Health and Safety Code (the possession or sale of heroin).

For the reasons and the many cases cited in *Garcia-Gonzales, supra*, we hold that it was the intention of the Congress not to recognize state "expungements" of the conviction of aliens for narcotics violations, so as to permit such violators to escape deportation.

It is the opinion of the Attorney General of the United States that the intention of Congress was to use the words " 'has been convicted' in the normal sense in which the term is used in Federal law." Matter of A——— F———, 8 I. & N. Dec. 429, 445-446. To permit each state to make its own definition of what the Congress intended to mean by the language "at any time has been convicted" would "make the deportability of the

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[2]Section 1203.4 of the Penal Code of the State of California reads in pertinent part:

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted . . . ; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

alien depend on the vagaries of state law." (*Idem.*) The panel of this court sitting in *Garcia-Gonzales, supra,* agreed with the Attorney General, as do we.

On the basis of the foregoing authority, the petition to review is denied.[3]

ELY, Circuit Judge, dissenting:

In reaching its harsh conclusion, the majority relies upon *Maria Garcia-Gonzales v. Immigration and Naturalization Service,* ——— F.2d ——— (9th Cir. 1965), recently heard and decided by another panel of our court. That panel's decision rests primarily upon an opinion of the Attorney General, Matter of A——— F———, 8 I. & N. Dec. 429. I do not agree with that opinion; consequently, I disagree with our court's decisions in *Garcia-Gonzales* and in the case at bar.

These are cases involving a problem of first impression, and the results work cruel consequences, not only to the two aliens directly concerned, but also to others who may become involved in a single violation of the law and be deprived of further incentive and opportunity to struggle for self-improvement, rehabilitation, and worthily contributive citizenship.

Many decisions are cited by our court in *Garcia-Gonzales;* however, as the court recognized, "None of these cases decides the precise question here presented." It was said that the "principles" of some of the cited cases required the ultimate conclusion. I do not believe that these so-called "principles" are sufficiently persuasive to override an established principle of the Supreme Court of the United States which is opposed and which we are obliged to respect.

Mr. Justice Douglas, speaking for all of his Brothers as our court was reversed in another deportation case, said:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent

[3]Counsel for petitioner has "preserved" a second point, made for the record only, reliance upon which is precluded in this court by our previous rulings in *Arrellano-Flores v. Rosenberg,* 310 F.2d 118 (1962) and *Gutierrez v. I. & N. Service,* 323 F.2d 593 (1963).

of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, at 10, 68 S.Ct. 374, 92 L.Ed. 433 (1948).[1]

Reiterating this principle, Chief Justice Warren has written, "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' * * * and should be strictly construed." *Barber v. Gonzales*, 347 U.S. 637, 642, 74 S.Ct. 822, 98 L.Ed. 1009 (1954).

While our court expressed awareness of this principle in *Garcia-Gonzales*, saying: "We are aware, too, that matters of doubt should be resolved in favor of the alien in deportation proceedings, because of the severity of the remedy invoked.", I sincerely believe that we gave no more than lip service to the doctrine. As emphasized, no decision bound us to the result which

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[1] In *Fong Haw Tan*, the court was concerned with the interpretation of Section 19(a) of the Immigration Act of 1917, as amended, which provided, in substance, that an alien "sentenced more than once" to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed after his entry should, subject to certain exceptions, be deported. The Supreme Court held that an alien convicted of the murder of two victims under two separate counts of one indictment and sentenced to life imprisonment under each of the convictions was not subject to deportation under the provisions of Section 19(a). In reviewing the legislative history, Mr. Justice Douglas, quoting from 53 Cong.Rec. 5167, wrote that the Section "was aimed at the alien 'who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted.'" It is just as clear, from the provisions of the California expungement statute itself, that its purpose was to offer another chance to one believed by a California court, upon the basis of proved rehabilitation, to have earned the benefits of the act.

was reached there and here. In *Garcia-Gonsales*, the alien lady, who, according to the opinion, "has been a self-respecting, self-supporting member of the communities in which she has lived." has resided in our country for over forty years. In 1961, she pleaded guilty to a California charge of unlawfully possessing narcotics. The California court granted probation upon certain conditions, and following the expiration of her probationary period, she appeared before the California court and was granted "expungement" under the provisions of Section 1203*A*, California Penal Code. Now, our court has said that while it will respect California law, insofar as California law provided for the crime and the "conviction", it may not accord to California the same respect in the application of its statute or of its decisions in the interpretation of the effect of a subsequent procedure taken under a California statute of the same dignity as that which created the crime. Not only does the logic of this approach escape me, but it is also true, I believe, that such a pronouncement is opposed to a principle which was hitherto thought to have been quite well established. In *Holzapfel v. Wyrsch*, 259 F.2d 890 (3rd Cir. 1958), the court said, at page 891:

> "In deportation cases where a state crime is involved, we have to look to the law and procedure of the state to interpret what happened in the state courts * * * *"

In *Sawkow v. Immigration and Naturalization Service*, 314 F.2d 34, 37 (3rd Cir. 1963), the court extended total respect to post-conviction procedures and determinations applied by the New Jersey courts which pertained to a crime for which the alien had been convicted in a New Jersey court. In discussing a contention of the Immigration and Naturalization Service, the court said,

> "It urges, however, that if a judgment of conviction is vacated for the purpose of avoiding deportation, a subsequent recommendation is ineffectual. This argument misses the mark, for no contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of *non vult* together with the judgment of conviction, and subsequently dismissing the indictment. Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment."

As we have seen, Mrs. Garcia-Gonzales, now at middle age, is to be deported and estranged from an environment in which she has lived and worked and been "a self-respecting, self-supporting member" for over forty years.

Here, however, we are immediately concerned with James Edward Kelly, now twenty-eight years of age. Twelve years ago, when he was only sixteen, he was, with his widowed mother, admitted to our country for permanent residence. He has served in the armed forces of the United States. On March 2, 1963, he pleaded guilty in a California court to a California charge pertaining to marihuana. The California court *suspended the proceedings without entry of judgment* and, presumably, upon the basis of Kelly's history and promise, granted probation for a period of three years upon condition that Kelly be confined in a county jail for six months less the period in which he had already been in custody. On October 8, 1963, there was entered by the same California court which had accepted the plea and granted probation the following order:

> "The motion of the defendant herein to terminate probation, to set aside the plea of Guilty, to enter a plea of Not Guilty, and to dismiss the complaint herein, having come on regularly before this Court on October 8, 1963, in Department 12 thereof, Honorable Judge Harry Neubarth presiding, and the Court, having heard and considered the evidence.
>
> IT IS HEREBY ORDERED that the sentence of probation of defendant be, and the same is hereby, terminated, that the plea of Guilty heretofore entered by defendant to the charge of violation of Section 11531 of the Health and Safety Code of California is set aside and a plea of Not Guilty thereto is entered and the complaint dismissed, pursuant to Sections 1203.3 and 1203.4 of the Penal Code of California."

Kelly was charged in a California court by California authorities with having violated a California law. The same California court which, in the beginning, accepted a plea of Guilty subsequently entered an order making it unmistakably clear that the previous plea of Guilty was "set aside and a plea of Not Guilty • • • entered and the complaint dismissed, • • • •". If we are to resolve "matters of doubt • • • in favor of the alien" as we said that we should do in *Garcia-Gonzales*, then I would hold, in

effect, as did the Third Circuit in *Sawkow*, that "the original judgment is as much a nullity as if the grand jury had never returned an indictment." But "no" said our court in *Garcia-Gonsales* and say the majority here, there are "principles" of California law which are oppositely guiding. Let us examine some of these "principles", for California authorities tell us that we have misunderstood or misapplied them. In the first place, it is doubtful, although our court has repeatedly held to the contrary, that a defendant who has pleaded Guilty in a California court which has granted him probation and suspended the proceedings without entry of judgment, such as did Kelly in the instant case, has even been "convicted." In *People v. Banks*, 1959, 53 C.2d 370, 348 P.2d 102, the Supreme Court of California wrote, at page 386,

> "By contrast, the defendant whose guilt has been established • • • but who has not been sentenced • • • i.e., where probation has been granted and the proceedings have been suspended without entry of judgment, is subject to no disabilities whatsoever except those specifically declared by some other provision of law or affirmatively prescribed by the court as terms or conditions of probation. *The probationer in the latter case still retains his ordinary civil rights,* • • • • " (Emphasis added.)

More recently, the California Supreme Court said:

> "• • • if probation is granted without pronouncement of sentence the probationer retains his ordinary civil rights."

In re Trummer (1964), 60 C.2d 658, 388 P.2d 177.

Criticizing our court for its refusal to respect California's so-called "dual definition of conviction", a California jurist has recently written,

> "In sustaining the deportation order, the Ninth Circuit Court relies principally upon *Banks* (*supra*, 53 Cal.2d 370), for the proposition that a plea, finding or verdict of guilty without judgment is a 'conviction' under California law. The court fails to recognize, however, that *Banks* holds that this type of conviction has no effect on civil rights and privileges. Here, defendant's privilege to remain in this country was clearly a civil right.

See *In re Ringnalda* (1943) 48 Fed. Supp. 975, where Judge Yankwich reached the opposite conclusion." Holland, "Conviction" Defined, 40, Journal of the State Bar of California, 36, at 47.

I reluctantly recognize the binding force of the critized precedents of our court and thus have this day concurred in our opinion in *Gonzalo Ramirez-Villa v. Immigration and Naturalization Service,* .....F.2d..... (9th Cir. 1965). Here, however, we not only have a case wherein proceedings were suspended and no entry of judgment was made, we have a case in which the California court, under the authority of California statutes, has, by formal order, set aside a plea of Guilty, accepted a plea of Not Guilty, and dismissed the complaint.

In passing, I point out that when our court, in *Garcia-Gonzales,* expressed "doubt that the California legislature * * * could, release petitioner from penalties or disabilities imposed by federal law," is ignored the fact that California was not enforced by the Federal Government to enact legislation creating a specific crime. Moreover, it apparently overlooked certain language of our own court in *Hernandez-Valensuela v. Rosenberg,* 304 F.2d 639, 640 (9th Cir. 1962), wherein Judge Merrill wrote "* * * there was no adjudication, *which would be recognized as final in Massachusetts,* that petitioner had committed any crime." (Emphasis added.)

If I am correct in my view that since the petitioner was charged with a California crime and since the proceedings in connection with the charge were had in a California court, we should look to the California law to ascertain the effect of the subsequent dismissal of the charge by the California court, then certain California cases are of particular significance. One of these is *Truchon v. Toomey,* 116 Cal.App.2d 736, 254 P.2d 638, 36 A.L.R. 2d 1230. There, the accused was charged with a felony and was placed on probation with no judgment of conviction having been entered, the same procedure which was applied with reference to the petitioner here. The "conviction" was expunged, as here, and the question was whether or not there had been a loss of voting eligibility under the California Constitution which provides that "* * * no person convicted of any infamous crime

• • • shall ever exercise the privileges of an elector in this State • • • •". The court held that release under the expungement statute effected restoration of the right to vote, and this decision of the intermediate California appellate court was expressly approved by the Supreme Court of California in *Stephens v. Toomey*, 51 C.2d 864, 338 P.2d 182.

In *Kelly v. Municipal Court*, 160 Cal.App.2d 38, 324 P.2d 990, there was an alleged violation of Section 288(a), California Penal Code, which defined a morals offense. Under Section 290, California Penal Code, conviction under the particular charge required registration and reregistration as a morals offender. The defendant was sentenced to the county jail but execution of the sentence was suspended and probation granted. Upon fulfillment of the period of probation, the verdict was set aside, and pursuant to the expungement statute, the defendant was granted release from all penalties and disabilities. The court upheld the former defendant's contention that since his so-called conviction had been expunged, he was not required to comply with the registration requirements.

In *People v. Taylor*, 178 Cal.App.2d 472, 3 Cal.Rptr. 186 (1960), the defendant was found to have possession of a pistol and was charged with violating Section 12021 of California's Penal Code which prohibits possession of concealed firearms by one "who has been convicted of a felony under the laws of the State of California • • • •". Theretofore, defendant, following a charge of attempted robbery, had been granted probation with the proceedings suspended and no sentence imposed. Following the expiration of the probationary period, the defendant had applied for, and obtained, relief under the expungement statute. The court held that the defendant was not subject to the second charge, the record of the prior violation having been "wiped clean" by the obtaining of the dismissal under the expungement statute and the consequent release from all "penalties and disabilities." The court said,

> "The clear intent of the probation sections of the Penal Code and especially of section 1203.4 is to effect the complete rehabilitation of those convicted of crime. The record of one released under this section is wiped clean, subject only to reinstatement when, and only when, the person

commits another and subsequent crime, or for purposes of those exceptional situations discussed *supra.*"

By the statute's express terms, its benefits are denied to one "who commits another and subsequent crime", and the "exceptional situations" mentioned by the court are seen in most of the cases cited by our court in *Garcia-Gonzales,* especially in its footnote "3". Except for those situations involving a second offense, covered by the express terms of the statute, the cases involve sanctions imposed by professional licensing statutes under which regulating authorities have traditionally been accorded broad discretion in granting or withholding privileges to engage in pursuits believed to demand special qualifications and in the discipline of those who have been so engaged. In its footnote "2",[2] the court, in *People v. Taylor, supra,* pointed to these exceptional situations and emphasized that California statutes created certain exceptions to the application of the expungement statute and its benefits.[3]

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[2]"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of his right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."

[3]In 1961, following the decision in *People v. Taylor, supra,* the expungement statute was amended so as to expressly provide that dismissal of an accusation or information under its terms should not be deemed to permit the ownership or possession of a firearm or to prevent conviction under Section 12021, California Penal Code.

Following the foregoing authorities, I would hold that if those who obtain the benefits of the expungement statute are thereby released from the disabilities of ineligibility to vote, the carrying of concealed firearms, and registration as one "convicted" of a morals offense, then one whose record of "conviction" is "wiped clean" should be released from the far more drastic disability of being subject to deportation and "banishment and exile" from his family and the land in which he lives.

I am of the conviction that, at the very least, the California statute, with its interpretation by the California courts, establishes a "doubt" which, said our court in *Garcia-Gonzales,* in its mention of the direction of *Fong Haw Tan,* "should be resolved in favor of the alien in deportation proceedings because of the severity of the remedy invoked."

Finally, we look at the opinion of the Attorney General upon which our court, in *Garcia-Gonzales,* and the majority here have so greatly relied, Matter of A——— F———, *supra.* The Attorney General has upheld the determination of the Immigration and Naturalization Service that expungement, under California law, of a record of any crime except one pertaining to narcotics saves the alien from deportation. The Attorney General, however, in disagreeing with the Board of Immigration Appeals, reasoned that narcotics offenders should be treated differently. Attempting to support this proposition, it was pointed out that in 1956, Congress amended Section 1251, Title 8, U.S.C., so as to provide that a narcotics offender should not be saved from deportation, as had formerly been the case, by the fact that he had been granted a pardon or by the fact that at the time of his conviction or within thirty days thereafter, the convicting court had recommended that he not be deported. I cannot agree with this particular reasoning of the Attorney General, and, significantly, it was not adopted in the majority opinion here or in the opinion in *Garcia-Gonzales.* It appears that the Congress intended that an alien should not benefit from a character of executive or judicial forgiveness which might be, and possibly had been, granted hastily and improvidently. The amendments, construed reasonably in favor of the alien, do not reach so far as to prohibit successful recourse to a state procedure dependent upon the successful meeting of probationary requirements with resulting clear evidence of rehabilitation and

court review, not only of the history which was thought to justify probation in the beginning, but also of the subsequent conduct upon which would rest the order dismissing the original charge and releasing the alien from disabilities. The Attorney General says, "Moreover, to follow the Board's views would make the deportability of the alien depend upon the vagaries of state law." The majority gives controlling weight to this consideration, and in *Garcia-Gonzales*, our court somewhat deprecatingly referred to "all of the niceties and nuances of state laws." Inherent in our system are "vagaries" and "niceties and nuances" of state laws. One might find himself running afoul of the anti-gambling laws of many states and yet, for the same act, to have committed no crime in the state of Nevada. When the Attorney General writes that "only in California and a few other states is provision made * * * for the withdrawal of a plea of Guilty, upon the termination of probation.", it cannot follow that this pioneering of California and "a few other states" in the penal field is necessarily evil. Had the expungement statute, since its enactment nearly twenty-four years ago, not have proved to be an effective deterrent to recidivism, it is reasonable to assume that California would have repealed it. I cannot see that respecting the "vagary" of the California expungement statute as interpreted by the California courts is more grevious than the recognition of the "vagaries" and the "niceties and nuances" of different applications of the same law with respect to different crimes and according to different opinions of the Board of Immigration Appeals and the Attorney General of the United States. If the Board and the Attorney General are to say, as they do, that an alien may be convicted in California of the most heinous crime and yet escape deportation by expungement of the record of that crime under the California law, then one who has been charged with possessing a marihuana cigarette should be spared from exile by consistent application of the same benevolent statute. Differing interpretations and applications of the California statute constitute, in sum, a trap for those unlearned in the "niceties and nuances" of the law.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 389

MARIA GARCIA-GONZALES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B 4–13) is reported at 344 F. 2d 804.

JURISDICTION

The judgment of the court of appeals was entered April 28, 1965. The petition for a writ of certiorari was filed July 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was "convicted" of a narcotics offense within the meaning of section 241(a)(11) of the Immigration and Nationality Act.

785-079—65

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251, provides in pertinent part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any

addiction-forming or addiction-sustaining opiate;.

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

Section 1203.4 of the California Penal Code is set forth on pages 3–5 of the petition.

STATEMENT

In November 1961, petitioner, a citizen of Mexico, was charged in the Superior Court of California with two counts of possessing heroin. Upon her plea of guilty, she was convicted and placed on probation for three years, on condition that she serve six months in jail and pay a fine of $1,000 (Pet. App. C). In De-

cember 1961 she was ordered deported on account of her narcotics conviction, pursuant to section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(11) (*supra*, pp. 2-3). In November 1962, having served her jail sentence, petitioner again appeared before the Superior Court, where her probation was terminated. Pursuant to section 1203.4 of the California Penal Code (Pet. 4), she was permitted to withdraw her guilty plea, and the information was dismissed (Pet. App. D). Thereupon petitioner moved to reopen the deportation order on the ground that she was no longer deportable under section 241(a)(11). The Board of Immigration Appeals denied the motion and dismissed the appeal (Pet. App. A), and the court of appeals affirmed (Pet. App. B).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with that of any other court. There is therefore no occasion for further review.

Whatever may be the case as to other types of offenses (see sections 241(a)(4), (b), *supra*, pp. 2, 3),[1] it is clear that Congress intended that an alien adjudged guilty of a narcotics offense should be deportable regardless of any provisions of State law mitigating the penalty. *Matter of A. F.*, 8 I&N Dec. 429, Pet. App. E; *Arrellano-Flores* v. *Hoy*, 262 F. 2d 667 (C.A. 9), certiorari denied, 362 U.S. 921;

[1] As to crimes other than narcotics offenses, the administrative position is that a State decision to set aside a conviction under a probation system such as California's precludes deportation under section 241(a)(4). *Matter of G.*, 9 I&N Dec. 159.

Gutierrez v. *Immigration and Naturalization Service*, 323 F. 2d 593 (C.A. 9), certiorari denied, 377 U.S. 910 (all cases involving essentially the same issue presented here). Indeed, it is immaterial for purposes of section 241(a)(11) whether the alien is given any State penalty at all. While the section originally applied only to aliens convicted *and* sentenced for narcotics offenses (46 Stat. 1171), it was amended over twenty years ago to delete the sentencing requirement (54 Stat. 673). And while Congress, in the case of other crimes, has given effect to pardons and recommendations against deportation by sentencing judges (section 241(b)), it has expressly provided to the contrary in the case of narcotics offenses. Narcotic Control Act of 1956, 70 Stat. 567, 575, amending section 241(b).[2] As the Attorney General observed in ruling that aliens adjudged guilty of narcotics offenses are deportable under section 241(a)(11) regardless of the remedial provisions of California law, "Congress has progressively strengthened the deportation laws dealing with aliens involved in [narcotics] traffic." *Matter of A.F.*, Pet. App. 51.[3] Thus the California probation statute, which provides

[2] For purposes of "clarification", so that "all doubt would be removed" (S. Rep. No. 1997, pp. 16, 20–21, 34–35; H. Rep. No. 2546, p. 17, 84th Cong., 2d Sess.), the following language was added to section 241(b): "The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable * * * under subsection (a)(11) of this section."

[3] The Attorney General's decision on the point in issue here was made upon reopening a case in which a deportation order had been affirmed by the Ninth Circuit, *Arrellano-Flores* v. *Hoy*, *supra*. A petition for certiorari to review that case was pending in this Court until after the Attorney General's ruling, at which time certiorari was denied.

in effect a means of pardoning a convicted narcotics offender, cannot affect the operation of section 241 (a)(11). This is particularly clear where, as here, the conviction, which has never been challenged on the merits, resulted in six months' imprisonment and a substantial fine.

There is no doubt that, under California law, petitioner was convicted of a narcotics offense. By its own terms, California Penal Code section 1203.4 provides that an accusation against a person may be dismissed *"if he has been convicted,"* and that, when the accusation is dismissed, the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime *of which he has been convicted."* (Emphasis added.) It also provides that "such prior conviction" may be pleaded and proved in a subsequent prosecution for any other offense. And as the court below pointed out, Pet. App. 8 n. 3, a conviction "expunged" under section 1203.4 remains a "conviction" for many purposes under California law.

None of the cases cited by petitioner (Pet. 7, 9) as conflicting with the decision below involved narcotics offenses or section 241(a)(11). *Pino* v. *Landon,* 349 U.S. 901, involved deportation under section 241(a)(4), which, as we have noted, has been treated quite differently from section 241(a)(11), both by Congress and by those responsible for the administration of the Act. *Sawkow* v. *Immigration and Naturalization Service,* 314 F. 2d 34 (C.A. 3) and *Holzapfel* v. *Wyrsch,* 259 F. 2d 890 (C.A. 3), likewise involved section 241(a)

(4). In *Sawkow,* the defendant was convicted on his plea of *non vult,* allowed to withdraw this plea and stand trial, and finally convicted after trial. The court held that the recommendation of the sentencing judge against deportation, made at the time of defendant's conviction after trial, was made "at the time of first * * * passing sentence" and was therefore efficacious under section 241(b). In *Holzapfel,* it was held that the court's order that the defendant undergo a series of psychiatric examinations pursuant to the New Jersey Sex Offenders Act was not a "sentence" within the purview of section 241(a)(4). Plainly the language quoted from these cases by petitioner has no relevance here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1965.

END